(1)

Supreme Court, U.S.
FILED

02 298 AUG - 7 2002

OFFICE OF THE CLERK

No.: _____

In The

SUPREME COURT OF THE UNITED STATES

RICHARD CARMENA; CARL DILLON; and
JOHNNY HUGGINS, *Petitioners*,

v.

GEORGIA-PACIFIC CORPORATION, *Respondent.*

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

Petition for Writ of Certiorari

Donna U. Grodner
GRODNER & ASSOCIATES
2223 Quail Run Drive, Suite B-1
Baton Rouge, Louisiana 70808
Telephone: (225) 769-1919
Facsimile: (225) 7691997

38 pp

QUESTIONS PRESENTED

I. **May a district court grant summary judgment in favor of a party notwithstanding the existence of genuine issues of material fact?**

II. **May a district court deny a Title VII claimant urging a complaint of disparate impact the opportunity to introduce pertinent and relevant evidence due to its being a collective bargaining agreement?**

III. **May a trial court order prevent a Plaintiff from obtaining discovery pursuant to Rule 56(f) of the Federal Rules of Civil Procedure despite extenuating circumstances?**

IV. **Does the test set forth by this Court in its ruling in the matter of Monell v. Department of Social Services of the City of New York, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978) apply to cases of disparate impact?**

PARTIES TO THE PROCEEDING

The following individuals are parties to the proceedings in the courts below:

Richard Carmena, Carl Dillon, and Johnny Huggins; *Plaintiffs-Appellants*;

Georgia-Pacific Corporation; *Defendant-Appellee.*

CORPORATION DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Supreme Court Rules, by information and belief, Defendant-Appellee Georgia-Pacific Corporation is a Georgia-based corporation licensed to do and doing business in the State of Louisiana. Sup. Ct. R. 29.6.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

CORPORATION DISCLOSURE STATEMENT ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

PETITION FOR WRIT OF CERTIORARI 3

OPINIONS BELOW 3

JURISDICTION 3

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED 3

STATEMENT OF THE CASE 4

I. The TABE (Test of Adult Basic Education) 7

II. The Five-Part Hands-On Skills Test . . 8

III. The Written Examination 8

IV. The Effect of the 1996 Testing Protocol 8

REASON FOR GRANTING THE PETITION 12

I. The lower courts erred in granting Georgia-Pacific's motion for summary judgment despite the presence of genuine issues of material fact 12

II. The lower courts failed to properly address the issue of whether the collective

bargaining agreement could be used as evidence 15

III. The lower courts inappropriately ruled that discovery was time-barred due to the fact that the Plaintiffs' previous attorney did not initiate discovery 19

IV. The lower courts erred in applying the Monell test to this case 20

CONCLUSION 23

APPENDIX 24

TABLE OF AUTHORITIES

Allen v. Rapides Parish School Board, 204 F.3d 619 (5th Cir. 3/2/00) 13

Allis-Chalmers Corp. V. Lueck, 105 S.Ct. 1904, 85 L.Ed.2d 206,(1/16/85) 16, 17

Boston Old Colony Ins. Co. v. Tiner Associates, Inc., --- F.3d ---- (5th Cir. 4/9/02) 13

Branson v. Greyhound Lines, Inc., Amalgamated Council Retirement and Disability Plan, 126 F.3d 747 (5th Cir. 10/30/97) 17

Broussard v. Southern Pacific Trans. Co., 665 F.2d 1387 (5th Cir. 1/25/82) 17

Burch v. City of Nacogdoches, 174 F.3d 615 (5th Cir. 5/10/99) 13

Carmena v. Georgia-Pacific Corporation, 35 Fed.Appx 3

Connecticut v. Teal, 457 U.S. 440, 102 S.Ct. 2525, 73 L.Ed.2d 130 (1982) 21

Doe v. Santa Fe Independent School District, 168 F.3d 806 (5th Cir. 2/26/99) 17

Evans v. City of Bishop, 238 F.3d 586 (5th Cir. 12/11/00) 12, 13

Griggs v. Duke Power Co., 401 U.S. 424, 432, 91 S.Ct. 849, 854, 28 L.Ed.2d 158 (1970) 21

Hall v. Gillman, Inc., 81 F.3d 35 (5th Cir. 4/18/96) 13

Hogue v. Johnson, 131 F.3d 466 (5th Cir. 12/12/97), *writ denied*, 523 U.S. 1014, 118 S.Ct. 1297, 140 L.Ed.2d 334 (1998) 17

International Shortstop, Inc. v. Rally's, Inc., 939 F.2d 1257, 1267 (5th Cir. 8/29/91), *cert. denied*, 502 U.S. 1059, 112 S.Ct. 936, 117 L.Ed.2d 107 (1/21/92) . 20

McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-803, 805-806, 93 S.Ct. 1817, 1824, 1825, 1826, 36 L.Ed.2d 668 (1973) 21

Monell v. Department of Social Services of the City of New York, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978) 11, 12

Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 120 S.Ct. 2097, 147 L.Ed.2d 105 (6/12/00) . 13

Regents of University of California v. Bakke, 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978) 21

St. Mary's Honor Center v. Hicks, 509 U.S. 502, 113 S.Ct. 2742, 125 L.Ed.2d 407 (6/25/93) 13

Walker v. Thompson, 214 F.3d 615 (5th Cir. 6/13/00) 12

Wichita Falls Office Associates v. Banc One Corp., 978 F.2d 915 (5th Cir. 12/4/92) 20

Wilson v. Taylor, 658 F.2d 1021 (5th Cir. 10/13/81) 17

PETITION FOR WRIT OF CERTIORARI

Petitioners Richard Carmena, Carl Dillon, and Johnny Huggins respectfully pray that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeal for the Fifth Circuit, (App. A), although not reported, is referenced in a "Table of Decisions Without Reported Opinions" as Carmena v. Georgia-Pacific Corporation, 35 Fed.Appx.387, 2002 WL 753802 (5th Cir. (La.)). The opinion of the United States District Court for the Middle District of Louisiana, (App. B.), is not, at this time, reported.

JURISDICTION

The Judgment of the United States Court of Appeals for the Fifth Circuit was entered on April 10, 2002. (App. A). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

42 U.S.C. § 1981 of the Civil Rights Act of 1964 provides that all persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

§1981 further specifies that the rights protected thereby are protected by nongovernmental discrimination.

STATEMENT OF THE CASE

The Petitioners herein are three African-Americans who began their employment with Defendant Georgia-Pacific Corporation, (hereinafter referred to as "Georgia-Pacific"), at its Port Hudson, Louisiana facility in late 1988 and early 1989. At all times applicable, there was in place a collective bargaining agreement (hereinafter referred to as "CBA"), between Georgia-Pacific and Union Locals 1334 and1335, which provided that transfers and promotions at this facility were to be awarded based upon a seniority system recognizing "mill seniority," or the length of time that an individual had been employed at the aforementioned Port Hudson facility.

Traditionally, employees, the majority of whom were Caucasian, had been promoted and transferred to higher paying positions as general or converting mechanics in the maintenance department based upon this system.

Purportedly due to the 1985 installation of the newer machines, Georgia-Pacific contends that the 1996 test protocol for both Converting Mechanics and General Mechanics was adopted to accommodate the need for "more skills in electrical and instrumentation work" to maintain and repair said machines. However, this contention begs the question that, if, indeed, such higher standards were necessary, why, then, were those individuals, who were previously and then employed as both Converting Mechanics and General Mechanics, not required to upgrade their skills and to prove these skills through the passage of literacy tests and the 1996 test protocol. It should further be noted that the alleged need for heightened skills in electrical and

instrumentation work may not necessarily be satisfied by the requirement of a college-equivalent reading level. Further, it is noteworthy that it took the powers that be at Georgia-Pacific some eleven years to arrive at this epiphany.

Additionally, although Georgia-Pacific contends that both mechanics must have reading and comprehension skills that enable them to follow written instructions and read technical manuals and other documents, the Record contains no proof that the test employed by Georgia-Pacific, the Test of Adult Basic Education ("TABE"), a literacy test, has any relevance whatsoever to develop or evaluate these skills. Further, there is nothing to justify the fact that those employees who were already performing these tasks at the time of the 1996 test protocol were ever tested despite the alleged need for such enhanced skills. Likewise, those employees given the new tests have never been followed by any job or skill evaluation. There is no competent proof in the Record of a skill evaluation to support the use of, or the need for, the 1996 test protocol.

At Georgia-Pacific, the whites have been promoted and transferred through the seniority system to the higher paying jobs as general and converting mechanics in the maintenance department such that as early as 1988 and by 1995, within the maintenance department there was only one African-American out of more than 30 converting mechanics and no more than 12 African-Americans out of 143 general mechanic employees, whereas 40-45 % of the production department was/is African-American. Thus, the higher paying jobs in general and converting mechanics were/are held almost exclusively by Caucasians. This is evidence of past discrimination.

In 1996, Georgia-Pacific posted several job openings for general mechanics. Georgia-Pacific also determined that those employees, (overwhelmingly

Caucasian), who were occupying positions as converting mechanics would be given preference over employees in other positions. Additionally, what was to be later referred to as the "1996 test protocol" was implemented. This test protocol consisted of a series of tests which were designed to identify those workers who met the maximum, rather than minimum, qualifications for these positions. Further, said test results were afforded subjective interpretation. No written proof, as was required by the union book, was ever introduced to suggest that these additional tests were ever negotiated and adopted by the union.

According to the provisions of the CBA, the applicant who possessed "the minimum qualifications for the bottom job in a line of progression will be given preference based on mill seniority." Those position openings posted prior to the implementation of the so-called "1996 test protocol" set forth as follows:

> Qualified Candidates must have an advanced level of skill/ability in one of the following crafts and an intermediate level in one other of the following crafts: electrical, instrumentation, pipefitting, millwrighting, welding.
>
> Must have a two year technical degree or education equivalent and at least three (3) years experience as an electrical, instrument, or mechanical craftsman in an industrial/manufacturing setting.

Although it is undisputed that each of the Petitioners herein met the minimal requirements for these positions applicable at the time the test protocol was posted in 1996, a different scenario was presented afterward as additional criteria were posted on the

Hourly Job Posting as follows:

> These positions will be filled by a competitive selection process which will include the TABE, (Test of Adult Basic Education), written test, hands-on assessments and interviews.

I. The TABE (Test of Adult Basic Education).

According to Georgia-Pacific, the TABE requires, in part, as follows:

> Must be able to add, subtract, multiply and divide as well as handle fractions, decimals, exponents and algebraic equations.
>
> Must be able to read, comprehend, express and apply technical data; also, be able to put same on paper in a logical and understandable manner with correct and adequate content subject matter, as well as to express orally; must be able to apply in testing and calibration situations.
>
> Must achieve a 12.9 on the TABE test as a measurement of the above listed basic skills.

According to Georgia-Pacific, this test was utilized to test literacy skills; thus, it is admitted that the TABE is a literacy test. It should be noted that it has never been shown that a score of 12.9 on this test, which indicates a level of reading proficiency equal to that of a college freshman, is in any way associated with the labor skills required for the posted maintenance and

mechanic positions.

II. The Five-Part Hands-On Skills Test.

In addition to the TABE, applicants for the mechanic positions were to complete a five-part hands-on skills test. This test proved to be prejudicial to the Petitioners as well in that it was scored by individuals who were not knowledgeable in the skills tested and many individuals were allowed to cheat by observing others complete the test prior to their taking the test.

III. The Written Examination.

Along with these tests, Georgia-Pacific also implemented a sophisticated written test. This test, which also consisted of five parts, was never shown to further any business purpose or to indicate an applicant's ability or proficiency at any labor-related tasks. Additionally, being that a general mechanic performs only one of five crafts, there is no necessity that he be proficient in all five crafts. Further, no legitimate business purpose may be served by this requirement.

Furthermore, there has been no follow-up testing to determine whether the 1996 test protocol has improved job performance. There has been no comparison offered between those persons who were employed as general or converting mechanics who never took the tests with those who took the tests.

IV. The Effect of the 1996 Testing Protocol.

In 1996, twenty-nine employees took these tests, six of which were African-American, one of whom allegedly passed and the other five of whom scored dead last. Of the eight persons transferred, only one was

African American; thus, the rate of hires of the African-Americans fell far below the 4/5ths Rule.

By July 1997, Georgia-Pacific determined that eight converting mechanics would be transferred to the 1996 posted general mechanic positions, so it posted positions for the soon to be vacant converting mechanic jobs. Again, the July 1996 protocol was implemented.

Although the Plaintiffs applied for these jobs, met the minimal qualifications and had mill seniority, they were not transferred to the 1997 posted positions. Thus, all positions at the time were filled by Caucasian employees. No African-American was transferred, and, thus, by 1997 converting mechanics was exclusively white. Again, the Georgia-Pacific's 1996 test protocol failed to be validated through the 4/5ths rule.

On August 18, 1997, the July 1996 posted positions were hired; yet, it was not until December 1997, that the Plaintiffs discovered who had been hired for the July 1996 posted positions. Thus, disparate impact became evident to Plaintiffs in December 1997. Three of the persons transferred to general mechanics, Gary Pique, Joseph Dardenne and James Rambin, had less mill seniority than the Plaintiffs, and Gary Lynch, the relative, did not meet the minimal educational or skill requirement. Mr. Lynch had only two years craft experience and no training. Initially his resume was marked "no," then later remarked "yes."

On January 19, 1998, Georgia-Pacific denied the December 4, 1996, grievance filed by seven African-American. On February 23, 1998, the Plaintiffs joined in a union grievance alleging racially discriminatory hiring practices arising from the failure of Georgia Pacific to adhere to the collective bargaining agreement with regard to transfer hires. On May 29, 1998, an EEOC

complaint was filed.[1]

On July 21, 1998, Georgia-Pacific denied the February 23, 1998, union grievance on the basis that it was "extremely broad and much to [sic] vague to address with any level of specificity." On August 7, 1998, the Georgia Pacific Corporate EEO department met with the Plaintiffs regarding their complaints.

On September 22, 1998, the May 29, 1998, EEOC charge was dismissed. Less than 90 days later, on November 30, 1998, this suit was timely instituted.

In November 1999 Georgia-Pacific posted more general mechanic jobs, which posting again adopted the 1996 test protocol. Although the Plaintiffs and other African-American applied for these positions, they were prevented by the 1996 protocol from transferring. By this time, converting mechanics were exclusively white; thus, if Georgia-Pacific relied upon its recently concocted seniority system giving converting mechanics seniority over every other employee in the mill, Plaintiffs never had a chance. Seventeen persons were transferred, many of whom had been hired in 1997.

With respect to the December 1999 job posting, Georgia-Pacific admits that each of the Petitioners again met the minimal requirements; however, Huggins and Dillon were unable to pass the TABE. In addition to the TABE, a written craft test and a hands-on craft skills test were included in the criteria for this job opening, again, despite the applicable provisions of the collective

---

[2] Three hundred days before May 29, 1998, was August 2, 1997. Thus, the May 29, 1998, EEOC charge was filed within three hundred days (300) of the December 1997 notice to Plaintiffs of the disparate impact. Additionally, the May 29, 1998, EEOC charge was filed within three hundred days (300) of the August 18, 1997, hiring for the July 1996 posted jobs. Thus, from either date, the EEOC complaint was timely instituted.

bargaining agreement (CBA). According to the affidavit of Mr. Cliff Andrews, offered by Georgia-Pacific, none of the three were able to pass either of these tests. Andrews further alleges that Carmena had withdrawn himself from consideration for the position prior to the decision being made. It should be noted that Andrews' affidavit is the sole source of all of these factual assertions. This begs the question of why Andrews' affidavit should be given more credibility than those of the Plaintiffs-Appellants and their witnesses from whose testimony indicates that Georgia-Pacific "bent" the rules for non-African-American applicants, but applied them strictly when considering African-Americans, such as Carmena, Dillon, and Huggins.

In November 2000, Georgia-Pacific posted more converting mechanic positions. This time one African-American was transferred and one was hired off the street. Whites were transferred and hired off the street for these converting mechanic jobs. Again, Plaintiffs along with other African-American applied, but were denied.

In February 2001, Georgia-Pacific posted general mechanic positions. Again, no African-Americans were allowed to transfer to these positions, and whites filled them, many of whom were the white off-the-street hires from the November 2000 posting. Again, Georgia-Pacific failed to apply mill seniority.

The ever present question remained that, if the 1996 were not a pretext to exclude blacks, then why were the whites who were already in maintenance not required to take and pass the tests. The end result of the 1996 test protocol, whether Georgia-Pacific concedes that this was the intent or not, was that African-Americans suffered a disparate impact from their non-minority counterparts. The lower courts fell into error in applying the test set forth in Monell v. Department of Social Services of the City of New York, 436 U.S. 658, 98

S.Ct. 2018, 56 L.Ed.2d 611 (1978).

REASON FOR GRANTING THE PETITION

The trial and appellate courts erred in failing to analyze this matter as a disparate impact case and in applying the test set forth in Monell v. Department of Social Services of the City of New York, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978), a wrongful termination suit, as a rigid protocol in a case concerning an employer's failure to promote. Additional error was committed when the trial court found that the minimal job requirements were set by the 1996 test protocol, rather than by the CBA and that the NLRB preempts Plaintiffs' efforts to offer the CBA as evidence of the job requirements and further, that all of the Plaintiffs' evidence was "self-serving," whereas Georgia-Pacific's evidence, (two affidavits), was credible. The Fifth Circuit furthered the trial court's error in affirming the trial court's granting of summary judgment.

I. The lower courts erred in granting Georgia-Pacific's motion for summary judgment despite the presence of genuine issues of material fact.

It is well established that courts of appeal review district courts' granting of summary judgment *de novo* and apply the same standard as would a district court. Evans v. City of Bishop, 238 F.3d 586 (5th Cir. 12/11/00) (citing Walker v. Thompson, 214 F.3d 615 (5th Cir. 6/13/00)). Further, Rule 56 of the Federal Rules of Civil Procedure provides that, if the party moving for summary judgment meets the initial burden of showing that there is no genuine issue of material fact, the burden shifts to the nonmovant to produce evidence or designate specific facts showing the

existence of genuine issues for trial. Evans, supra, (citing Allen v. Rapides Parish School Board, 204 F.3d 619 (5th Cir. 3/2/00)). Additionally, any doubts are to be resolved in favor of the nonmoving party; any reasonable inferences must be drawn in favor of that party. Evans, supra, (citing Burch v. City of Nacogdoches, 174 F.3d 615 (5th Cir. 5/10/99)), also see Boston Old Colony Ins. Co. v. Tiner Associates, Inc., --- F.3d ---- (5th Cir. 4/9/02).

Further focusing on matters involving employment discrimination, this Court, in Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 120 S.Ct. 2097, 147 L.Ed.2d 105 (6/12/00), reasoned that once a plaintiff has established a prima facia case, the burden shifts to the defendant to produce evidence that the plaintiff was rejected, or that someone else was preferred, for a legitimate, non-discriminatory reason. This burden is one of production, not persuasion; it can involve no credibility assessment. Reeves, supra, 530 U.S. at 142, 120 S.Ct. at 2106, (citing St. Mary's Honor Center v. Hicks, 509 U.S. 502, 113 S.Ct. 2742, 125 L.Ed.2d 407 (6/25/93)). From this point, the plaintiffs bear the burden of demonstrating that the defendants' assertions are pretextual; thus the ultimate burden of persuasion remains with the plaintiff. See Hall v. Gillman, Inc., 81 F.3d 35 (5th Cir. 4/18/96).

In this matter, the Plaintiffs have, as required, established a *prima facia* case of race-based discrimination against the Defendant, Georgia-Pacific. Thus, the burden shifted to Georgia-Pacific to produce evidence to rebut the Plaintiffs' case. The trial court noted:

> Although this court is quite concerned by the indication that Georgia Pacific has increased the requirements for the lowest level mechanic position to such a point

> that not one African American who applied could meet them, these plaintiffs have not provided to the court the basic facts to allow them to proceed.

Georgia-Pacific contends that the tests administered to these employees were required to qualify for higher-level, skilled positions. Genuine issues of material fact were raised with respect to whether the administration of these tests were legitimate or pretextual to the disparate treatment suffered by the Plaintiffs, and, as previously stated, it is well established that any doubt must be resolved in favor of the nonmoving party.

Plaintiffs have consistently maintained that the TABE literacy test and other tests within the 1996 test protocols were not part of the minimal qualifications for the posted position. The CBA is proof positive that the only additional qualifications beyond minimal education and craft experience is seniority. Georgia-Pacific admits that Plaintiffs met these minimal qualifications. Plaintiffs had that seniority. Plaintiffs were denied the posted positions based on trumped up, artificial, and superfluous job qualifications that have never been shown to advance any legitimate Georgia-Pacific business purpose. Moreover, it was a clear and intentional violation of the CBA to inject the 1996 test protocol into the job posting. In view of the disparate impact effected by the 1996 test protocol, Georgia-Pacific's failure to adhere to the CBA constituted, not only an intentional violation of contract, but is hand-in-hand direct evidence of intentional racial discrimination. Georgia-Pacific cannot and has not denied that it knew or should have known of the disparate impact occasioned by the 1996 test protocol.

The statistics submitted by the Plaintiffs prove disparate impact. Thus, summary judgment was

precluded as a matter of law.

II. The lower courts failed to properly address the issue of whether the collective bargaining agreement could be used as evidence.

The Collective Bargaining Agreement (CBA) is a contract that controls terms of employment between the Plaintiff labor union members and their employer, Georgia-Pacific. Apparently the straight seniority requirement in the CBA allowed non-African-American (white) employees to hold the positions of influence and higher paying jobs and was, thus, effective in achieving the discriminatory end intended by this majority faction. After nearly twenty years, however, as the African-American faction gained seniority in this system, the whites were forced to employ further means to sustain their racially-cleansed work environment. According to the District Court, Plaintiffs have not offered sufficient evidence to support a finding of racial animus or intent to discriminate.

While it is a rare case where the smoking gun may be located and presented as direct evidence of intent, INTENT may be proven through circumstantial evidence. Proving a case through circumstantial evidence requires a weighing and balancing as well as credibility determinations. Whether a party has proven his/her case through circumstantial evidence is a finding better left to a jury. Here, this case is riddled with disputed issues of fact. The trial court improperly made a credibility determination that Georgia-Pacific's two affidavits offered as its sole evidence were entitled to more credibility than an expert opinion, the testimony of the three plaintiffs, affidavits of numerous co-workers and documents of which the authenticity has never been questioned. The Trial Court improperly usurped the role of the jury. This case should be heard by a jury

whose job it is to weigh facts and make credibility determinations.

Despite the fact that the Plaintiffs were saddled with the burden of exposing the pretextual motives which underlay Georgia-Pacific's purported interest in administering said tests, and the fact that the best evidence of the requirements for such positions was detailed in the applicable CBA, the Plaintiffs were denied the opportunity to present this document; thus, by this denial, the Plaintiffs were unfairly torpedoed in their efforts to meet their burden.

In justifying this denial, the court of appeal, during oral argument, stated that matters concerning the CBA are preempted and are subject to the jurisdiction of the National Labor Relations Board, (NLRB). The Supreme Court, in the matter of Allis-Chalmers Corp. V. Lueck, 105 S.Ct. 1904, 85 L.Ed.2d 206,(1/16/85) reasoned as follows:

> Of course, not every dispute concerning employment, or tangentially involving a provision of a collective-bargaining agreement, is pre-empted by § 301 or other provisions of the federal labor law. Section 301 on its face says nothing about the substance of what private parties may agree to in a labor contract. Nor is there any suggestion that Congress, in adopting § 301, wished to give the substantive provisions of private agreements the force of federal law, ousting any inconsistent state regulation. Such a rule of law would delegate to unions and unionized employers the power to exempt themselves from whatever state labor standards they disfavored. Clearly, § 301 does not grant the parties to a collective- bargaining

> agreement the ability to contract for what is illegal under state law. In extending the pre-emptive effect of § 301 beyond suits for breach of contract, it would be inconsistent with congressional intent under that section to preempt state rules that proscribe conduct, or establish rights and obligations, independent of a labor contract.

It should further be noted that the Fifth Circuit had acknowledged the Allis-Chalmers decision in more recent years in the matter of Branson v. Greyhound Lines, Inc., Amalgamated Council Retirement and Disability Plan, 126 F.3d 747 (5th Cir. 10/30/97). Therein, the Fifth Circuit noted that, to the extent that a defense raised would implicate a collective-bargaining agreement at all, it would do so only tangentially, and, thus, would not preempt the underlying state claim. Branson, supra, at 754 (citing Allis-Chalmers, supra, (not every dispute concerning employment, or tangentially involving a provision of a collective-bargaining agreement is preempted by §301)).

It should then be noted that the general rule is that one panel may not overrule another. Wilson v. Taylor, 658 F.2d 1021 (5th Cir. 10/13/81), Broussard v. Southern Pacific Trans. Co., 665 F.2d 1387 (5th Cir. 1/25/82), Hogue v. Johnson, 131 F.3d 466 (5th Cir. 12/12/97), *writ denied*, 523 U.S. 1014, 118 S.Ct. 1297, 140 L.Ed.2d 334 (1998), and Doe v. Santa Fe Independent School District, 168 F.3d 806 (5th Cir. 2/26/99). The instant ruling by the Fifth Circuit creates a lack of continuity in its opinions. Thus, clarification of this issue by this Court is needed.

Addressing the factual basis of this argument in the context Allis-Chalmers, supra, to suggest that the reliance upon applicable provisions of a CBA to establish

job requirements is preempted is inappropriate. Further, the prohibition of this evidence irreparably prejudiced the Plaintiffs' ability to carry the statutorily established burden.

The CBA's job qualifications under contract were followed for decades up and until 1996. In addition, presently in most parts of Georgia-Pacific's Port Hudson facility, the CBA is still followed to the letter. Georgia-Pacific has never shown why those persons in the production department who, day in and day out, operate the Georgia-Pacific equipment may be hired in accord with the CBA based on minimal requirements and seniority; yet, for those persons who maintain the equipment (the higher paying jobs) should be hired on the non-CBA basis of passage of a literacy test. In addition, while the whites had seniority, Georgia-Pacific adhered to the CBA. When the African-Americans began obtaining seniority, Georgia-Pacific unilaterally breached the CBA. This is circumstantial evidence of intentional discrimination. Moreover, if the 1996 test protocol is truly indicative of job performance (which is denied), why was the 1996 protocol never used to evaluate the job performance of the current maintenance employees?

Georgia-Pacific, in its brief to the Fifth Circuit, stated, "[t]he law simply does not require Georgia-Pacific to pass up qualified persons and hire unqualified persons, based solely on race or seniority or any other criteria which Plaintiffs would have Georgia-Pacific use." Notably, Georgia-Pacific freely entered into the CBA with the Plaintiff workers. If the CBA had such an untoward effect (which is denied), the law of contracts <u>does</u> require Georgia-Pacific to pass up qualified persons and hire unqualified persons.

While this conclusion is absurd, it is significant that Georgia-Pacific has never shown that the effect of an adherence to the CBA resulted in the hiring of unqualified persons. Thus, Georgia-Pacific has not

shown just cause, or any legitimate business purpose, to support its failure to adhere to the CBA.

III. The lower courts inappropriately ruled that discovery was time-barred due to the fact that the Plaintiffs' previous attorney did not initiate discovery.

When the Plaintiffs urged their complaint that the trial court had erred by denying them the opportunity to discover information necessary to defeat Georgia-Pacific's motion for summary judgment, the trial court indicated that, being that the attorney who initially represented the Plaintiffs prior to the undersigned's enrolling in the matter, the Plaintiffs were not entitled to extend the time for discovery in this matter. It should be noted that no trial date had been set in this case; thus, there was no issue of any undue delay which would have been occasioned by extending discovery.

Until the undersigned counsel enrolled as counsel for Plaintiffs, Plaintiffs were, for all purposes, before the trial court in proper person. The previous attorneys took not one deposition and failed to follow-up on their document requests. The appellate court should have considered that fact in determining whether the district court abused its discretion in refusing to allow for a very limited additional discovery. As such, the Plaintiffs were doomed from the beginning in their desperate efforts to challenge the motion for summary judgment.

There was no dalliance on the part of the undersigned Plaintiffs' counsel, who, immediately amended the complaint and sought to secure deposition, discovery, and to subpoena records from a third party and to obtain the 30 (b)(6) of GP. The Magistrate refused any additional discovery and offered to sanction the

undersigned for attempting to obtain any additional discovery.

The purpose of Rule 56(f) is to provide nonmovants with a much needed tool to keep open the doors of discovery in order to adequately combat a summary judgment motion. Wichita Falls Office Associates v. Banc One Corp., 978 F.2d 915 (5th Cir. 12/4/92). Such "continuance of a motion for summary judgment for purposes of discovery should be granted almost as a matter of course" unless "the nonmoving party has not diligently pursued discovery of the evidence." International Shortstop, Inc. v. Rally's, Inc., 939 F.2d 1257, 1267 (5th Cir. 8/29/91), *cert. denied*, 502 U.S. 1059, 112 S.Ct. 936, 117 L.Ed.2d 107 (1/21/92).

Obviously, said Plaintiffs have been prejudiced by previous counsel's failure to act; however, such negligence of that counsel should not, in any manner avoidable, serve to further prejudice the laymen Plaintiffs. Certainly to expect *pro sé* litigants to act with that level of legal prowess expected of members of the bar would be unjust and would invite rampant abuse from unethical practitioners. Thus, the trial court should have allowed the Plaintiffs, through their newly enrolled counsel, adequate time to discover such evidence as would be necessary to challenge Georgia-Pacific's summary judgment motion.

IV. The lower courts erred in applying the Monell test to this case.

As a result of the trial court's preventing the Plaintiffs from introducing evidence of the CBD and furthering the discovery process in accordance with Rule 56, the Plaintiffs were unable to show that Georgia-Pacific's scheme to exclude African-Americans from the more desirable jobs served no legitimate business purpose. Had Plaintiffs been allowed to introduce such

evidence as would inarguably have illustrated Georgia-Pacific's purpose, the trial court would have been left with no alternative but to address this matter as a disparate impact case.

Disparate impact is a basis for relief under Title VII if the practice in question is not founded on "business necessity," or lacks "a manifest relationship to the employment in question." Regents of University of California v. Bakke, 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978), (citing Griggs v. Duke Power Co., 401 U.S. 424, 432, 91 S.Ct. 849, 854, 28 L.Ed.2d 158 (1970)). See also McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-803, 805-806, 93 S.Ct. 1817, 1824, 1825, 1826, 36 L.Ed.2d 668 (1973).

In the matter of Connecticut v. Teal, 457 U.S. 440, 102 S.Ct. 2525, 73 L.Ed.2d 130 (1982), this Court was faced with a situation not unlike the present in which African-American employees of a state agency claimed that a written promotion examination discriminated against them on the basis of their race in violation of Title VII of the Civil Rights Act of 1964. In that matter, as in this, the trial court dismissed their action for their allegedly having failed to establish a *prima facie* case. Upon granting certiorari, this Court held that an employer's acts of racial discrimination in promotions, effected by an examination having a disparate impact, rendered said employer liable for racial discrimination suffered by employees barred from promotion, even if the "bottom line" of the promotional process was an appropriate racial balance. Connecticut v. Teal, supra.

In this matter, Georgia-Pacific cannot, and does not appear to have made any attempt to, suggest that its motivation in implementing the 1996 test protocol had anything to do with balancing the racial composition of the employees. Therefore, Georgia-Pacific should certainly be liable to the Plaintiffs herein who were

barred from promotion as a result of the 1996 test protocol.

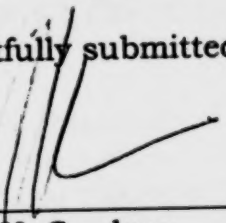
Had Plaintiffs been allowed to introduce the CBA and to further their discovery, such evidence sufficient to prove that no legitimate business purpose was served by the 1996 test protocol would have been gleaned. From that point, the trial court would have had to address this matter as one of a clear disparate impact occasioned by the divisive implementation of a discrimination-perpetuating scheme thinly veiled in the 1996 testing protocol.

Such discriminatory tools serve no purpose but to exclude otherwise qualified individuals from obtaining better jobs. Therefore, those unfortunate enough to fall prey to these tactics are entitled to recovery under the provisions of Title VII.

CONCLUSION

For the reasons set forth herein, the foregoing Petition for Certiorari should be granted.

Respectfully submitted;



Donna U. Grodner
GRODNER & ASSOCIATES
2223 Quail Run Drive, Suite B-1
Baton Rouge, Louisiana 70808
Telephone: (225) 769-1919
Facsimile: (225) 7691997

APPENDIX

A. Opinion of the Fifth Circuit Court of Appeals

B. Judgment of the District Court for the Middle District of Louisiana

C. Ruling of Motions for Summary Judgment, for Reconsideration and for Review of Magistrate's Discovery Rulings of the District Court for the Middle District of Louisiana

U.S. COURT OF APPEALS
FILED
APR 10 2002
CHARLES R. FULBRUGE III
CLERK

UNITED STATE COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 01-30883

RICHARD CARMENA, CARL DILLON, JOHNNY HUGGINS,
Plaintiffs-Appellants,

versus

GEORGIA-PACIFIC CORPORATION,
Defendant-Appellee.

Appeal from the United States District Court
for the Middle District of Louisiana
(99-CV-5)

Before JOLLY, JONES, and BARKSDALE, Circuit Judges.

PER CURIAM:*

This action arises out of claimed race-based discrimination by Georgia-Pacific Corporation, concerning Appellants not being selected for promotion

---

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. 47.5.4

To higher-level, skilled jobs. Summary judgment was awarded Georgia-Pacific. See Carmena v. Georgia Pacific Corp., No. 99-05-D (M.D. La. 26 June 2000); Fed. R. Civ. P. 56.

No statutory authority need be cited for the fact that review of a summary judgment is *de novo*, with such judgment being proper if there are no issues of material fact and if the movant (Georgia-Pacific) is entitled to a judgment as a matter of law. Along this line, the district court did not abuse its discretion for use in opposing summary judgment.

For purposes of our review, we assume *arguendo* that all Appellants' claims were properly raised in district court and that none are procedurally barred. In any event, as discussed in part by the district court, we hold that the claims fail under theories of disparate treatment and disparate impact. In short, summary judgment was proper.

AFFIRMED

FILED
U.S. DISTRICT COURT
MIDDLE DIST. OF LA.

01 JUN 26 AM 10:20

SIGN _____
by DEPUTY CLERK

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

RICHARD CARMENA,
CARL DILLON and JOHNNY HUGGINS

CIVIL ACTION

VERSUS

NO. 99-05-D

GEORGIA-PACIFIC CORPORATION

JUDGMENT

For the written reasons assigned this date;

IT IS ORDERED, ADJUDGED AND DECREED that judgment be entered in favor of defendant, Georgia-Pacific Corporation, and against Plaintiffs, Richard Carmena, Carl Dillon and Johnny Huggins. This action is hereby DISMISSED in its entirety.

Baton Rouge Rouge, Louisiana, this 25th day of June, 2001.

s/ James J. Brady
JAMES J. BRADY, JUDGE
MIDDLE DISTRICT OF LOUISIANA

DKT. & ENTERED
DATE _____
NOTICE MAILED TO
DATE 6/26/01 BY BW

FILED
U.S. DISTRICT COURT
MIDDLE DIST. OF LA.

01 JUN 26 AM 10:20

SIGN _____
by DEPUTY CLERK

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

RICHARD CARMENA,
CARL DILLON and JOHNNY HUGGINS

CIVIL ACTION

VERSUS

NO. 99-05-D

GEORGIA-PACIFIC CORPORATION

RULING ON MOTIONS FOR SUMMARY JUDGMENT, FOR RECONSIDERATION AND FOR REVIEW OF MAGISTRATE'S DISCOVERY RULINGS

This matter is before the court on motions by defendant Georgia-Pacific Corporation ("Georgia-Pacific") for summary judgment and for reconsideration of this court's denial of their motions for summary judgment on procedural grounds granting plaintiffs' leave to amend the petition as well as by the plaintiffs, for review of Magistrate Reidlinger's discovery rulings issued February 23, 2001 and March 13, 2001. The motions are opposed. Jurisdiction is based on **28 U.S.C. § 1331**, there is no need for oral argument.

Plaintiffs, Richard Carmena, Carl Dillon and Johnny Huggins bring this action against their employer, Georgia-Pacific Corporation, claiming that they were discriminated against because of their race in violation of the Civil Rights Act of 1964 ("Title VII"). Each also makes a claim for race discrimination under **42 U.S.C. § 1981.**

Defendant originally brought a motion for summary judgment on procedural grounds only, in accordance with the court's scheduling order. That motion was denied by the court and subsequently they filed the instant motion for summary judgment on substantive grounds, again in accordance with the scheduling order. Defendants have also requested reconsideration of the ruling on procedural grounds. Since this matter is disposable on substantive grounds, the two motions for reconsideration on procedural grounds need not be addressed. Further, the motion to strike will be denied.

As to the motion for summary judgment on substantive grounds, the shifting burdens of production, and the ultimate burden of proof, in a Title VII claim are well established. First the plaintiff must establish a prima facie case of discrimination. Second, the defendant must articulate some legitimate, non-discriminatory reason for the challenged employment action. Third, the plaintiff must then prove by a preponderance of evidence that the defendant intentionally discriminated. **Russell v. McKinney Hospital Venture**, 2000 WL 1785541 (5th Cir. 2000). Clearly the plaintiff's burden of proof is heavy and it is the same for the claims under § 1981.

In this case, the defendant makes several arguments that plaintiffs' case should be dismissed. The most convincing of which is that plaintiffs cannot even meet their initial burden of establishing a prima facie case of discrimination. The well settled principles for establishing a prima facie case of discrimination were set forth by the Supreme Court beginning with **McConnell Souglas Corp. v. Green, 411 U.S. 792 (1973).** That case held that a Title VII plaintiff bore the initial burden of proving his prima facie case of discrimination by a preponderance of the evidence. The prima facie case consists of a showing that (1) plaintiff is a member of a protected class, (2) plaintiff sought and was qualified for an available employment position, (3)

plaintiff was rejected for that position and (4) the employer continued to seek applicants with plaintiff's qualifications. **Id. at 801-803.**

Defendant argues that the plaintiffs were not qualified for the positions at issue and that as a result that they cannot meet their initial burden of proof, necessitating that their case be dismissed. A review of the evidence before the court in light of the standards for summary judgment shows that the plaintiffs have failed to put forth admissible evidence that they were qualified for the positions they sought.

Summary judgment is appropriate if the moving party establishes that there is no genuine issue of material fact and that it is entitled to summary judgment as a matter of law. **F.R.C.P. 56(c); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).** In response, plaintiffs must present contradictory evidence on that issue. Conclusory claims and subjective beliefs are insufficient to create a material issue of fact for summary judgment. **Grimes v. Texas Dep't of Mental Health, 102 F.3d 137, 139 (5th Cir. 1996).**

In its motion for summary judgment, defendant has brought forth affidavit and documentary evidence that the positions at issue required certain minimum qualifications that the plaintiffs did not have. In opposition, plaintiffs offer their own opinion that they were qualified, hearsay evidence of qualifications previously utilized and conclusory statements that the tests were not relevant to the job. They argue that the qualifications set forth by Georgia Pacific are not necessary to the job, yet there is no admissible evidence whatsoever that supports this contention, Without this basic element of proof, plaintiffs cannot move forward. Although this court is quite concerned by the indication that Georgia Pacific has increased the requirements for the lowest level mechanic position to such a point that not one African American who applied could meet them, these plaintiffs have not provided to the court the basic

facts to allow them to proceed. It is clear on the record that there is not genuine dispute of material fact with regard to the qualification issue and as such, defendant is entitled as a matter of law, to summary judgment.

Accordingly, defendant's motions for reconsideration (docs. 76 & 78) are DENIED as MOOT, the motion to strike (doc. 142 is hereby DENIED and the motion for summary judgment (doc. 112) is hereby GRANTED. Plaintiffs claims shall be dismissed in their entirety. Further all motions for leave to file additional briefs (docs. 141, 145, 151 & 152) are GRANTED. Plaintiffs' motion for review of the magistrate's discovery rulings (doc. 123) and motion to amend pretrial order (doc. 143) are hereby DENIED as MOOT.

Baton Rouge, Louisiana, this 25th day of June, 2001.

s/ James J. Brady
JAMES J. BRADY, JUDGE
MIDDLE DISTRICT OF LOUISIANA